

TOWN OF ACTON
472 Main Street
Acton, Massachusetts 01720
Telephone (978) 264-9636
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Planning Department

INTERDEPARTMENTAL COMMUNICATION

To: Planning Board **Date:** January 6, 2006
From: Kristin K. Alexander, AICP, Assistant Town Planner *KKA*
Subject: Village Arms Apartments – Decision 01-06
(also referred to as “Spring Hill Commons Apartment Complex”)

In 1999, the middle apartment building at Village Arms Apartments (419 Great Road) was severely damaged by a fire and rendered uninhabitable. Section 8.7 of the Acton Zoning Bylaw (Bylaw) provides that nonconforming multifamily dwellings may be reconstructed if the Planning Board grants a special permit for reconstruction. The applicant filed for a special permit to reconstruct the building and the Board granted a special permit with conditions. The Decision was filed with the Town Clerk on 5/10/01 (see Decision 01-06 attached).

Condition 3.2.11 of Decision 01-06 states that “all work and construction on the Site shall comply with Acton Board of Health regulations” (which encompass Department of Environmental Protection (DEP) regulations). The applicant has been working on a waste water treatment system for the site since before the special permit was issued. They still have not received DEP approval. Recently, the applicant wrote Garry Rhodes, the Building Commissioner, requesting assurance that a building permit would still be issued in connection with Decision 01-06 once all necessary approvals (including DEP’s) have been received. Mr. Rhodes said that the applicant would need to go back before the Board because Section 3.3.4 of Decision 01-06 states that:

“the special permit shall lapse if substantial use thereof has not commenced within two years of the filing date of this decision with the Town Clerk, except for good cause...a request to extend said time limits must be made in writing to the Board at least 30 days prior to said expiration dates, and the Board herewith reserves its rights and powers to grant or deny such extension, to issue any appropriate changes to the special permit and to require any appropriate modifications of the Plan.”

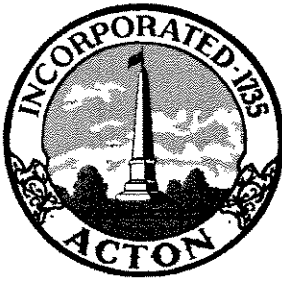
The applicant is requesting the Planning Board to authorize the Building Commissioner to issue a building permit for reconstruction of the building once all approvals are received (see attached letter from Graham & Harsip, P.C. to the Planning Board dated 12/15/05)¹.

Besides Decision 01-06 and the applicant’s request letter to the Board, I have attached the following to provide you with additional history on the special permit and the chain of events since:

- Village Arms Apartments Site Plan excerpts (submitted with the special permit application)
- Town Counsel’s email to the Building Commissioner (12/5/05);
- the applicant’s request letter to the Building Commissioner (11/29/05);
- memos from Roland Bartl to the Planning Board during the Village Arms public hearing process (2000 - 2001).

¹ The term “tolling” is used frequently in the Graham & Harsip letter, which means “to temporarily stop.”

Because the special permit requires compliance with Health Department / DEP regulations before a building permit is issued, and since the applicant continues to try but has not yet received DEP approval for the proposed waste water system, staff believes there is "good cause" why the special permit lapsed and why it should be extended. Staff also believes that in the end, a reconstruction of the apartment building would improve the general area and help address an important need for affordable housing as stated in the Master Plan and the To Live in Acton report. Even though these units would not be restricted affordable, there is a need for market rate rental housing that meet various income levels. If the Planning Board agrees and finds good cause to extend the special permit lapse date and authorize the Building Commissioner to issue a building permit once all necessary approvals are received, the Board will also have to waive the 30 day advance notice requirement to extend the lapse date established by the special permit.



RECEIVED & FILED
DATE May 10, 2001
E. Brown
TOWN CLERK, ACTON

TOWN OF ACTON
472 Main Street
Acton, Massachusetts 01720
Telephone (978) 264-9636
Fax (978) 264-9630

Planning Board

**DECISION
01-06**

**Village Arms Apartments
also referred to as the
Spring Hill Commons Apartment Complex**

**Special Permit for Reconstruction of Nonconforming Multifamily Dwelling
May 9, 2001**

Decision of the Acton Planning Board (hereinafter the Board) on the application of Victor Morgenthaler, on behalf of GPT-Acton, LLC (Owner, Grove Property Trust), both of 598 Asylum Avenue, Hartford, CT 06015 (hereinafter the Applicant). The property is located at 411, 419, and 421 Great Road, and 25 and 33 Harris Street in Acton, and shown on the 2000 Acton Town Atlas map C-5 as parcels 54 and 67-1 and 2. (hereinafter the Site).

This Decision is in response to an application for a special permit application received by the Acton Planning Department on June 1, 2000 pursuant to Section 8.7 of the Acton Zoning Bylaw (hereinafter the Bylaw) to allow the reconstruction of a nonconforming multifamily dwelling.

The Applicant presented the subject matter of the special permit to the Board at a duly noticed public hearing on July 24, 2000. Attorney Stephen R. Graham of Graham and Harsip, P.C., assisted the Applicant in the presentation. The hearing was continued to September 25, 2000, November 6, 2000, December 18, 2000, February 12, 2001, and April 23, 2001 and then closed. Board members Patrick E. Halm (Chairman), Ken Sghia-Hughes (Vice Chairman), Hartley E. Millett, Edwin F. Pearson, Lauren S. Rosenzweig and Christopher S. Tolley were present. The minutes of the hearing and submissions on which this decision is based upon may be referred to in the Planning Department or the Town Clerk's office at the Acton Town Hall.

1 EXHIBITS

Submitted for the Board's deliberation were the following exhibits:

- 1.1 A "Site plan for 419 Great Road, Acton MA 01720" dated 12/1999, drawn by Acton Survey & Engineering, Inc. of Acton consisting of one sheet, subsequently modified by Architectural Partners, Inc. of 103 Morse Street, Watertown, MA.
- 1.2 A "Site Plan (S-1)" for 419 Great Road, Acton dated 5/26/00, prepared by Architectural Partners, Inc., consisting of one sheet.
- 1.3 Architectural plans consisting of two sheets, A-1.1 - Floor Plans, dated 5/26/00 and A-1.2 - Elevations (dated 12/30/00), prepared by Architectural Partners, Inc.
- 1.4 Supplemental items and documentation:
 - A properly executed special permit, dated 5/31/00.
 - Filing fee.
 - Certified abutters' list.

- Copy of the 1969 building permit for the building in question.
 - 1969 record plans for the site.
 - An application cover letter, dated 6/1/00.
- 1.5 Interdepartmental communication received from:
- Acton Building Commissioner, dated 6/19/00;
 - Acton Community Housing Corporation, dated 6/29/00;
 - Acton Engineering Department, dated 7/19/00;
 - Acton Fire Chief, dated 7/13/00;
 - Acton Health Director, dated 7/11/00;
 - Acton Historical Commission, dated 6/14/00;
 - Acton Housing Authority, dated 6/29/00;
 - Acton Natural Resources Director, dated;
 - Acton Planning Department, dated 7/19/00, 11/3/00, and 4/20/01;
 - Acton Tree Warden & Municipal Properties Dir., dated 6/13/00; and
 - Acton Treasurer's Office, dated 6/8/00.
- 1.6 Other:
- Copy of letter from Irfan Nasrullah, Massachusetts Department of Environmental Protection, to Doug Halley, Acton Health Director, dated 7/5/00.
 - Agreements for the public hearing continuation and the decision deadline extension, dated 7/24/00, 9/25/00, 11/6/00, 12/18/00, and 2/12/01.
 - Letter from Atty. Steven R. Graham, dated 2/9/01, concerning change in property ownership and hearing extension.

Exhibits 1.1 through 1.4 are referred to herein as the Plan.

2 FINDINGS AND CONCLUSIONS

Based upon its review of the exhibits and the record of the proceedings the Board finds and concludes that:

- 2.1 The Site is located within the Residence A (R-A) zoning district and Zone 3 of the Groundwater Protection District.
- 2.2 The Site contains five apartment buildings, three on Great Road, and two on Harris Street.
- 2.3 The middle apartment building at 419 Great Road was severely damaged in a 1999 fire and rendered uninhabitable. Since then, the structural ruins remain on the Site.
- 2.4 Section 8.7 of the Bylaw provides that nonconforming multifamily dwellings may be reconstructed, if the Board grants a special permit for the reconstruction.
- 2.5 The Applicant filed the special permit application to reconstruct the building within one year of the date of the fire, as the Bylaw requires (section 8.7.2).
- 2.6 The Bylaw provides that the Board should seek to reduce or eliminate nonconformities to the extent possible (section 8.7.1).
- 2.7 The Site is nonconforming to the Bylaw on four points:
 - Consistent with then applicable law, the multifamily buildings were constructed in about 1969 without a special permit. The Bylaw today requires a special permit for multifamily use in the R-A District (section 3, table of principal use, line 3.3.4, column R-A).
 - There are 104 dwelling units in five buildings on the +/-11 acre Site, or +/-9.5 units per acre. The Bylaw limit today is 5 units per acre (section 5.3.2.1).

- The approximate wastewater discharge on the site is over 20,000 gpd with standard septic systems. The discharge limit without tertiary treatment in Zone 3 of the Groundwater Protection District is 6,000 gpd per buildable lot (section 4.3.7.2, Table 4.3.7.2, lines 21 & 22).
 - In the rear parking lot, pavement runoff enters the adjacent wetlands without prior treatment. The Bylaw today requires that all such runoff be treated before discharge. Section 4.3.6.3 of the Bylaw describes the desired method of treatment.
- 2.8 The three latter items are the substantive nonconformities:
- *Density*: The damaged building itself contained eighteen of the 104 dwelling units. The Applicant proposes to rebuild all eighteen units. Apartments such as those on the Site provide housing for lower income households in Acton. Reducing the degree of nonconformity relative to density would diminish or eliminate housing for lower income people. The reconstruction of all eighteen units is therefore appropriate and needed.
 - *Wastewater*: The current septic disposal system is inadequate and outdated. It is a concentrated source of untreated wastewater in a groundwater sensitive area. The Massachusetts Department of Environmental Protection (DEP) declared the Site in violation of the Massachusetts Clean Water Act and issued an Administrative Order - UAO-CE-99-1003. DEP also made it clear that it will not allow re-established wastewater flows for the subject building if it is reconstructed as long as the Site is in violation of the Clean Water Act. This matter is still under court review. Regardless of its final resolution, the Board finds it is imperative that the disposal method must be improved.
 - *Parking Lot Runoff*: Full compliance cannot be practically achieved due to the high groundwater table. However, some improvements can be made with little effort.
- 2.9 Since the application date and before the close of the public hearing ownership of the Site changed to a new owner - Equity Residential. A representative of Equity Residential (Donna DiCenso of Norwood) attended the last public hearing session.
- 2.10 The Plan shows a complete reconstruction on a footprint slightly larger than that of the damaged building. More recently, the new owner indicated that, depending on the outcome of DEP matters, it might restore the damaged building rather than build a replacement. In any case, an increase in building floor area or pavement area by more than 1,200 square feet will trigger a site plan special permit in addition to the special permit granted herein.
- 2.11 The Massachusetts Building Code in CMR 521 sets forth requirements for units in an apartment complex that are accessible for persons with disabilities.
- 2.12 Massachusetts General Law, Chapter 148, section 26 requires that the reconstructed building be equipped with an automatic sprinkler and fire alarm system.
- 2.13 The Acton Housing Authority reports that at the time of the fire three subsidized tenants resided in the building. The Acton Housing Authority and the Acton Community Housing Corporation have voiced concern that the building, after reconstruction, may not be available to eligible tenants with rent subsidies, such as Federal Section 8 vouchers. The Applicant stated that general law prohibits discrimination against Section 8 certificate holders.
- 2.14 The Board received comments from various Town departments listed in Exhibit 1.5 above. The Board considered these comments in its deliberations, made them available to the Applicant, and incorporated them into this decision as deemed appropriate by the Board.
- 2.15 The Plan as amended herein and the proposed multifamily use as approved herein, are appropriate for the Site; consistent with the Master Plan; in harmony with the purpose and intent of the Bylaw, specifically Section 8.7; are not detrimental or injurious to the

neighborhood, and except for continuing nonconformities identified herein, complies with the applicable requirements of the Bylaw.

3 BOARD ACTION

Therefore, the Board voted at its May 7, 2001 meeting to **GRANT** the requested special permit subject to and with the benefit of the following waivers, Plan modifications, conditions, and limitations.

3.1 PLAN MODIFICATIONS

Except for purposes of securing the building to prevent further damage, deterioration, or vandalism, the Building Commissioner shall not issue a building permit for the reconstruction of the damaged building, nor shall any such construction activity begin on the Site, until and unless he finds that the Plan is revised to include the following additional, corrected, or modified information. Except where otherwise provided, all such information shall be subject to the approval of the Building Commissioner. Where approvals are required from persons or agencies other than the Building Commissioner, the Applicant shall be responsible for providing evidence of such approvals to the Building Commissioner.

- 3.1.1 Show a DEP-approved wastewater disposal system for the Site. The wastewater disposal system for the Site shall be subject to Board of Health approval and, at a minimum, meet the April 23, 2001 Board of Health policy standards for biological oxygen demand (BOD), suspended solids, and nitrogen (Total Kjeldahl Nitrogen) removal efficiency.
- 3.1.2 Show a "water quality swale" consistent with the Mass. Stormwater Policy to capture pavement runoff from the parking lot. Add curbing along the pavement edges as necessary to channel water towards the swale. The final design of the swale shall be subject to approval by the Board or its designee.
- 3.1.3 If the Applicant proceeds with the reconstruction of a new building from the ground up according to the Plan, including the architectural plans A-1.1 and A-2.1 (Exhibit 1.3), the Plan shall be revised to show horizontal ridge lines on the 3rd floor dormers and rectangular staircase windows above the side entrances.
- 3.1.4 If the Applicant should choose to restore the damaged building instead of building a new one, the Building Commissioner shall not issue a building permit until the Board has reviewed and approved revised architectural floor and elevation plans, and a revised site plan. This would constitute a plan modification and special permit amendment under paragraph 3.4.5 of this decision.
- 3.1.5 Submit a landscape plan for approval by the Board or its designee.
- 3.1.6 Show the new sidewalk along Great Road and a walkway leading from that sidewalk past the north-side entrance connecting with the existing sidewalk in the rear of the building.
- 3.1.7 Show the location and specify the size of the water main needed to supply water for domestic use and fire suppression.
- 3.1.8 Show a direct fire department connection in a location specified by the Acton Fire Chief.
- 3.1.9 The Plan shall be modified to comply with the Bylaw. Unless directed otherwise herein, the Plan shall also be modified to address all departmental comments received by the Board in a manner that resolves any concerns raised therein to the satisfaction of the Board.

3.2 CONDITIONS

The following conditions shall be binding on the Applicant and its successors and assigns. Failure to adhere to these conditions shall render this special permit null and void, without force and effect.

and shall constitute grounds for the revocation of this special permit, and of any building or occupancy permit issued hereunder. The Town of Acton may elect to enforce compliance with this special permit using any and all powers available to it under the law.

- 3.2.1 Before the issuance of any occupancy permit for the reconstructed building, all improvements shown on the Plan, as revised herein, shall be completed as shown on the Plan.
- 3.2.2 The reconstructed building shall contain eighteen dwelling units.
- 3.2.3 The reconstructed building shall contain dwelling units for persons with disabilities in compliance with CMR 521 of the Massachusetts Building Code. These units shall be certified as being ready for occupancy and in compliance with Massachusetts Architectural Access Board standards before or concurrently with all other dwelling units in the building.
- 3.2.4 The reconstructed building shall be equipped with automatic sprinklers and fire alarm systems in compliance with MGL, chapter 148, section 26.
- 3.2.5 No person or household that qualifies for rental subsidies from the Federal Section 8 rental assistance program, or any similar Federal, State, or Town subsidy program shall be denied tenancy in the reconstructed building on the basis of having to rely on such subsidy to pay rent or other housing costs.
- 3.2.6 The Applicant shall not cause or permit the runoff of water or erosion that results in the flooding or siltation of any street, way or drainage facility owned or maintained by the Town. If such runoff or erosion occurs, the Building Commissioner may order the immediate cessation of any excavation, construction and building activities until the conditions that caused the runoff or erosion have been corrected.
- 3.2.7 All taxes, and penalties and back charges resulting from the non-payment of taxes, shall be paid in full prior to the issuance of a building permit.
- 3.2.8 No work under this special permit shall begin before the issuance of a building permit.
- 3.2.9 All work on the Site shall be conducted in accordance with the terms of this special permit and shall conform with and be limited to the improvements shown on the Plan as modified herein.
- 3.2.10 All water service lines shall be installed in accordance with the specifications of the Acton Water Supply District.
- 3.2.11 All work and construction on the Site shall comply with Acton Board of Health regulations.
- 3.2.12 All work and construction on the Site shall be performed in compliance with the applicable law and regulations protecting wetlands and wildlife habitat in the Town of Acton.
- 3.2.13 This decision shall be recorded at the Middlesex South District Registry of Deeds or the Land Court before the issuance of a building permit for the proposed building reconstruction on the Site.

3.3 LIMITATIONS

The authority granted to the Applicant under this special permit is limited as follows:

- 3.3.1 The foregoing required modifications and conditions have been stated for the purpose of emphasizing their importance, but are not intended to be all inclusive or to negate the remainder of the Bylaw and the Rules.
- 3.3.2 This special permit applies only to the Site identified in this decision and to the proposed use and activity as shown on the Plan.

- 3.3.3 Other approvals or permits required by the Bylaw, other governmental boards, agencies or bodies having jurisdiction shall not be assumed or implied by this decision.
- 3.3.4 This special permit shall lapse if substantial use thereof has not commenced within two years of the filing date of this decision with the Town Clerk, except for good cause, or if construction under this special permit is not continued through to completion as continuously and expeditiously as is reasonable. Commencement of substantial use of this special permit shall mean that actual construction activity to rebuild the damaged building has started on the Site. For construction to continue towards completion as continuously and expeditiously as is reasonable, construction activity shall not rest for more than 1 year. A request to extend said time limits must be made in writing to the Board at least 30 days prior to said expiration dates, and the Board herewith reserves its rights and powers to grant or deny such extension, to issue any appropriate changes to the special permit and to require any appropriate modifications of the Plan.
- 3.3.5 The Board hereby reserves its right and power to modify or amend the Plan and the terms and conditions of this special permit with or without a public hearing upon the request of the Applicant, his designees or assigns, or upon its own motion.

4 APPEALS

Appeals, if any, shall be made pursuant to MGL, Ch. 40A, S. 17 and shall be filed within 20 days after the date of filing this decision with the Town Clerk.



Roland Bartl, AICP, Town Planner
for the Acton Planning Board

This is to certify that the 20-day appeal period on this decision has passed and there have been no appeals made to this office.

Ed Ellis, Town Clerk

Date

Copies furnished:

Applicant - certified mail #
Engineering Administrator
Conservation Administrator
Police Chief
Historical Commission
Historic District Commission

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2023962844

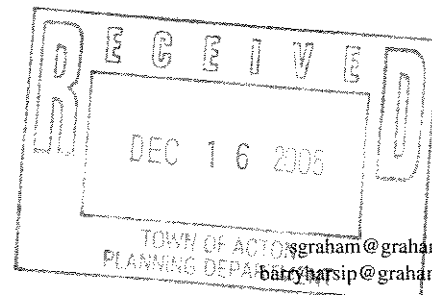
Building Commissioner
Municipal Properties Director
Town Manager
Acton Water District
Assistant Assessor

Health Director
Town Clerk
Fire Chief
Owner

GRAHAM & HARSIP, P.C.

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STEVEN R. GRAHAM
BARRY S. HARSIP**

AIMEE BONACORSI
JAY R. PEABODY

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December 15, 2005

VIA FACSIMILE AND REGULAR MAIL

Planning Board
Town of Acton
472 Main Street
Acton, MA 01720

Re: Decision 01-06, Village Arm Apartments
Spring Hill Commons Apartment Complex

Dear Board Members:

This office represents the current owner of the above-noted property, Equity Residential.

On November 29, 2005, I submitted a letter to Garry A. Rhodes, the Building Commissioner, requesting his assurance that a building permit would issue in connection with the above-noted Decision (copy enclosed). The cited provisions of M.G.L. Chapter 40A, Section A, the provisions of Section 10.3.7 of the Acton Zoning By-Law and various cases support my position that the lapse of the Special Permit as provided for Section 3.3.4 of the Decision was "tolled" by my client's inability to implement the Special Permit.

I have recently spoken with Garry and he has indicated that he is not willing to provide me with a letter assuring my client of the use of the Special Permit. He suggested that I come before the Board on this matter. Therefore, I am requesting that this matter be placed on the agenda at the next Board meeting (January 10, 2006). At that time, I will ask that the Board consider the

GRAHAM & HARSIP, P.C.

Planning Board
December 15, 2005
Page Two

"tolling" issue and that the Board authorize the Building Commissioner to implement the Special Permit upon receipt by my client of final approval from the Board of Health and the Department of Environmental Protection regarding sewerage disposal.

Very truly yours,

GRAHAM & HARSIP, P.C.

A handwritten signature in black ink, appearing to read "S. R. Graham", with a long horizontal line extending to the right.

Steven R. Graham

SRG/jm
Enclosure
cc: Client

LANDSCAPED AREA
EDGE OF LANDSCAPED AREA
EXISTING 5' CONTOUR LINE
EXISTING 1' CONTOUR LINE
EDGE OF PAVEMENT
EXISTING RETAINING WALL
EXISTING MANHOLE

ZONE DISTRICT: R-A
 SETBACKS: FRONT: 30'
 REAR: 10'
 SIDE: 10'
 FLOOR TO AREA RATIO: NONE
 MINIMUM FRONTAGE: 200'
 MIN LOT AREA: 100,000 SQ.FT.
 MIN OPEN SPACE: 35%
 MAX. BLDG. HEIGHT: 36'

PARCEL A
TOTAL SITE AREA
11.00 ACRES

PROPOSED SITE PLAN

419 GREAT ROAD
ACTON MA 0720

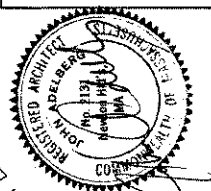
ARCHITECTURAL
PARTNERS INC.

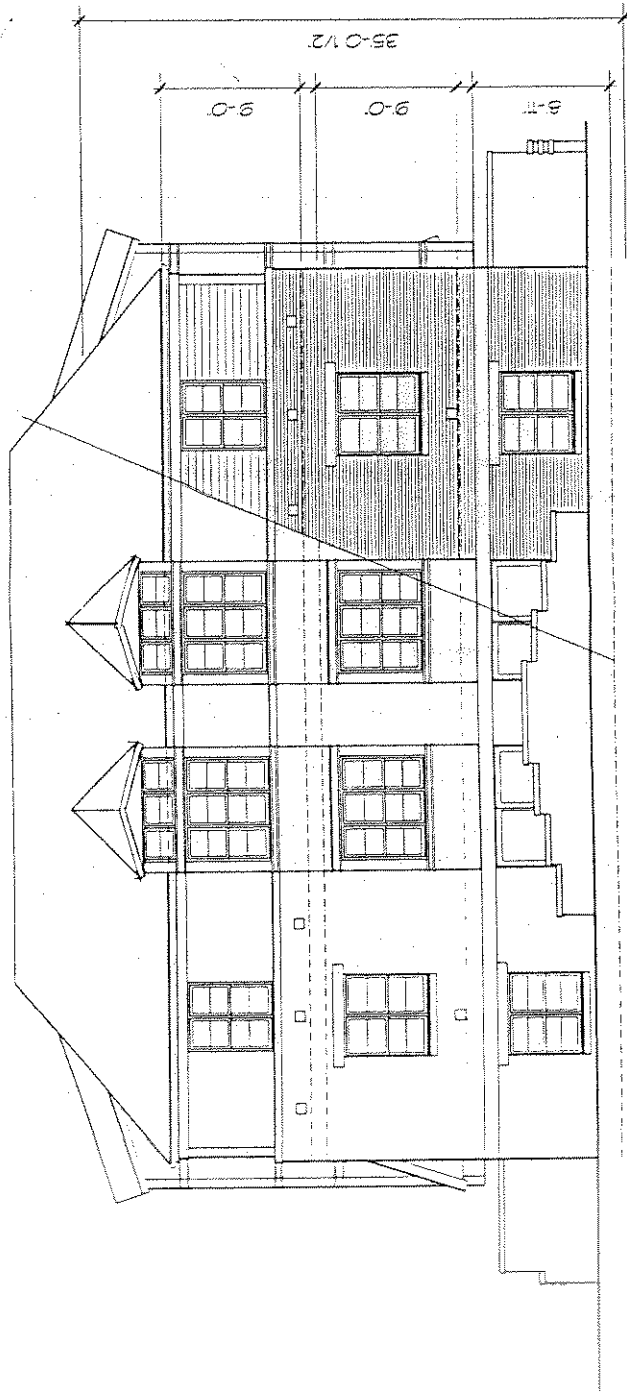
LAND PLANNING
ARCHITECTURE
DEVELOPMENT
CONSULTING

103 Horse Street - Suite 2
Waverlytown - MA 02472-2551
617-923-2380 - Fax 617-923-4437
openings @ mcrs.net

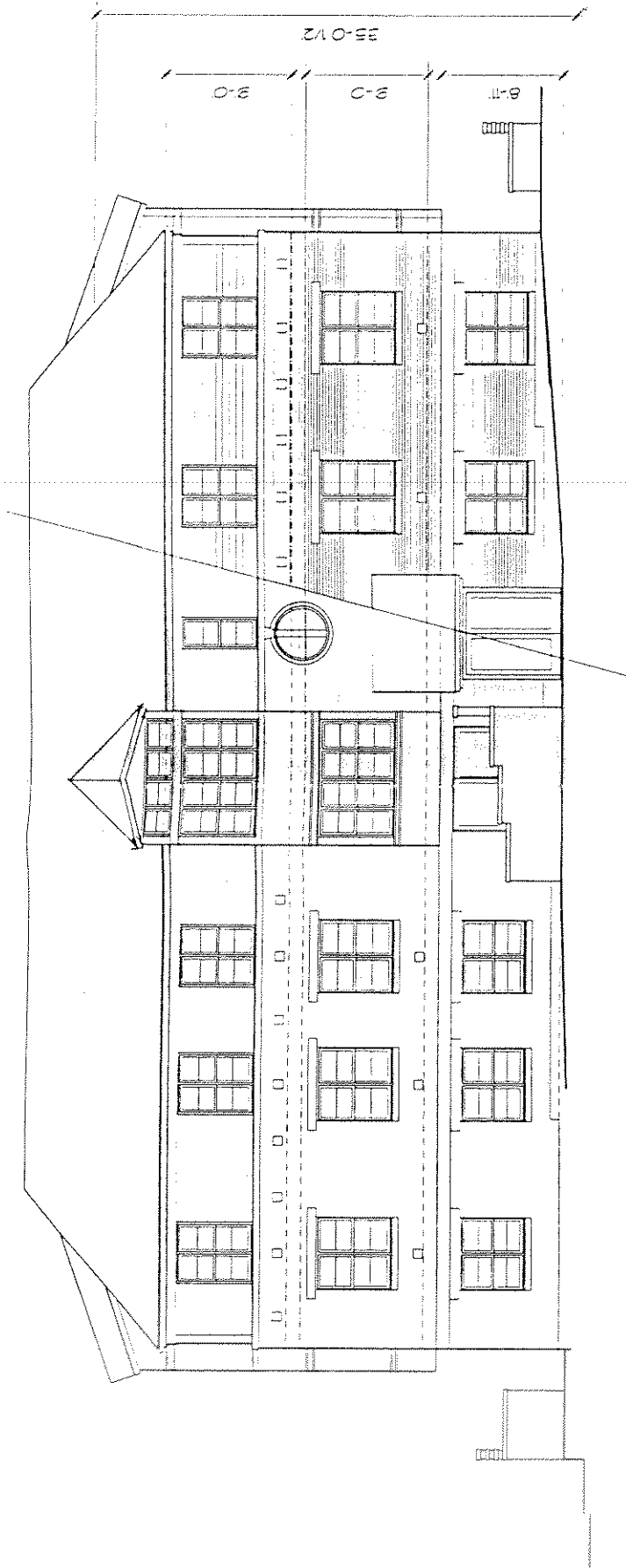
NOTE:
BASE INFORMATION FROM SURVEY
BY ACTION SURVEY AND ENGINEERING
SCALE: 1" = 20'

SCALE: 1"=20'





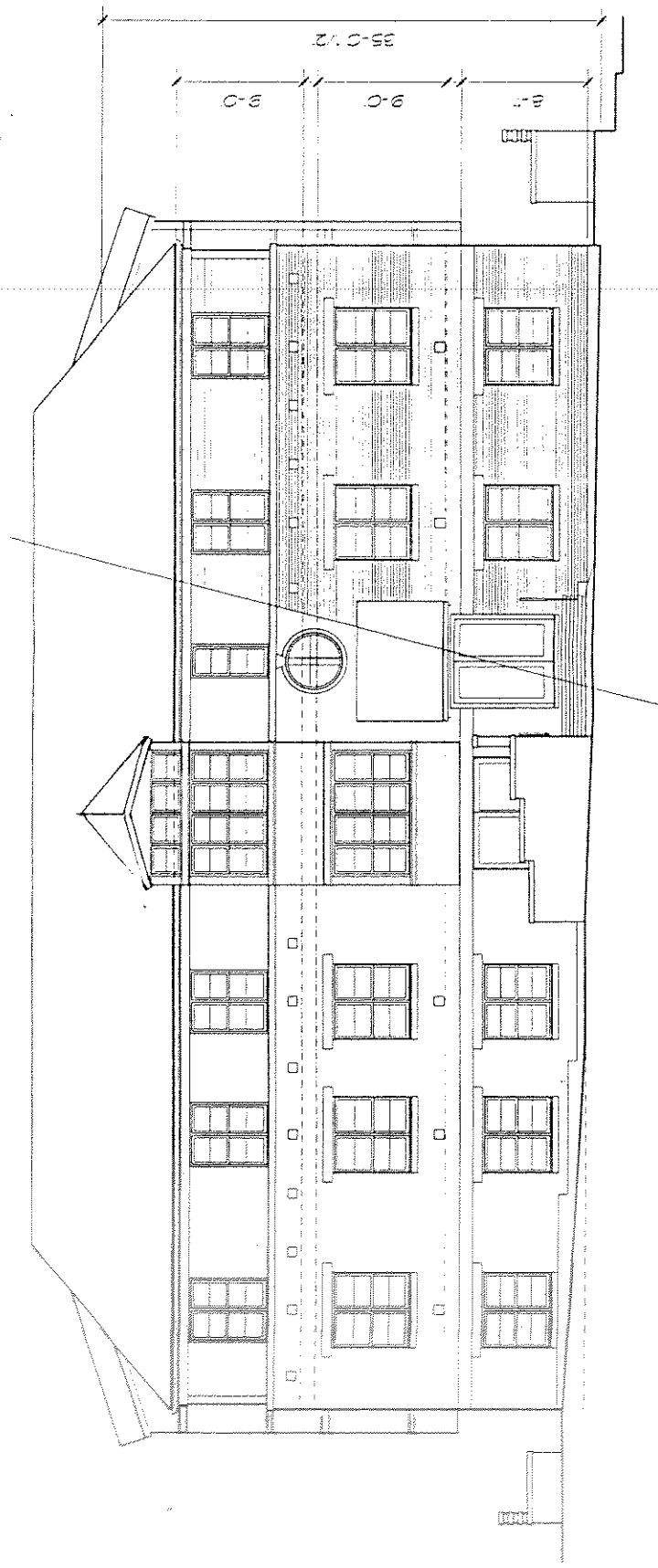
GREAT ROAD ELEVATION (C)



LEFT SIDE ELEVATION

B

RELEASES /	PROJECT:	SCALE:	PROJECT#:	DATE:	DRAWN:	CHECKED:	SHEET TITLE
	419 GRE, ACTON						ELEVAT



A
 RIGHT SIDE ELEVATION



Garry Rhodes

From: Stephen Anderson
Sent: Monday, December 05, 2005 11:36 AM
To: Garry Rhodes
Cc: Don Johnson; John Murray
Subject: Acton/GenBldgCommr: Village Arms Special Permit Lapse

Hi Garry:

I have reviewed Steve Graham's letter dated November 29, 2005, regarding the question of whether you can and should issue a building permit for the reconstruction of the building at 419 Great Road pursuant to the Planning Board special permit # 01-06, filed with the Town Clerk on May 10, 2001. I conclude that you should not do so unless and until the Planning Board finds "good cause" to extend the special permit lapse date and waives the 30 day advance notice requirement for a request to extend the lapse date established by the special Permit in question. The grounds for this conclusion are as follows:

- The special permit became final on May 10, 2001, when it was filed with the Town Clerk.
- G.L. c. 40A, s. 9, provides, "Zoning ordinances or by-laws shall provide that a special permit granted under this section shall lapse within a specified period of time, not more than two years, which shall not include such time required to pursue or await the determination of an appeal referred to in section seventeen, from the grant thereof, if a substantial use thereof has not sooner commenced except for good cause or, in the case of permit for construction, if construction has not begun by such date except for good cause."
- As no appeal was taken within 20 days, the right to use the permit was not tolled by an appeal.
- Section 10.3.7 of the Acton Zoning Bylaw provides, "A special permit shall lapse if a substantial use thereof has not commenced except for good cause or, in the case of a permit for construction, if construction has not commenced except for good cause within a period of time to be specified by the special permit granting authority, not to exceed two years from the date of grant thereof."
- There seems to be no question that "substantial use" of the special permit has not begun and "construction has not commenced" under the special permit within 2 years. The question is whether there was "good cause" for not doing so and who is the arbiter of the question of "good cause."
- Section 3.3.4 of the special permit provides, " This special permit shall lapse if substantial use thereof has not commenced within two years of the filing date of this decision with the Town Clerk, except for good cause, or if construction under this special permit is not continued through to completion as continuously and expeditiously as is reasonable. Commencement of substantial use of this special permit shall mean that actual construction activity to rebuild the damaged building has started on the Site. For construction to continue towards completion as continuously and expeditiously as is reasonable, construction activity shall not rest for more than 1 year. **A request to extend said time limits must be made in writing to the Board at least 30 days prior to said expiration dates, and the Board herewith reserves its rights and powers to grant or deny such extension, to issue any appropriate changes to the special permit and to require any appropriate modifications of the Plan.**" (Emphasis added.)
- Accordingly, the Planning Board, not the Building Commissioner, must make the determination as to whether the permit holder has shown "good cause" as to why the special permit has not lapsed.
- As for the special permit's requirement that the permit holder must apply to the Board for an extension at least 30 days before the lapse date (which the permit holder did not do in this case), Section 3.3.5 of the special permit provides, "The Board hereby reserves its right and power to modify or amend the Plan and the terms and conditions of this special permit with or without a public hearing upon the request of the Applicant, his designees or assigns, or upon its own motion." Accordingly, the Planning Board has the power to waive the requirement that the request for an extension be filed at least 30 days before the lapse date if it finds good cause to do so in this case.
- The cases cited by Attorney Graham are not inconsistent with this conclusion:
 - *Belfer v. Building Com'r of Boston* 363 Mass. 439, 294 N.E.2d 857 (Mass. 1973) (filing of appeal from granting of variances tolled running of two-year period during which variances

12/5/2005

had to be used) - There was no appeal in the Village Arms case, so this case is inapposite.

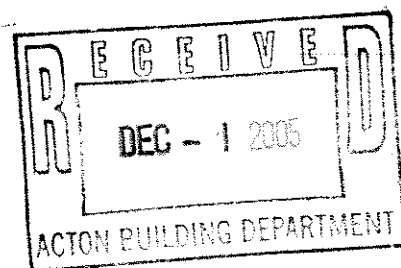
- *Pasqualino v. Board of Appeals of Wareham*, 14 Mass.App.Ct. 989, 440 N.E.2d 523 (Mass.App., 1982) (impediments which arose because of financial difficulties experienced by developers did not warrant tolling of seven-year grace period of statutory "freeze" on zoning amendments; the "seven-year period under ... G.L. c. 40A, § 6, may be tolled if litigation, appeals or actions by municipal officials make the legality of the construction or plans questionable so as to impede work on or completion of the project") - In the Village Arms case, there were no "appeals or actions by municipal officials [to] make the legality of the construction or plans questionable so as to impede work on or completion of the project."
- *Smith v. Board of Appeals of Brookline*, 366 Mass. 197, 316 N.E.2d 501 (Mass. 1974) (the statutory six-month period in which nonconforming construction must begin was not tolled in the instant case, despite the claim of owner and builder that 'real practical impediments' to starting construction prevented them from taking advantage of the six-month period; "the record shows that the litigation was terminated by the owner who abandoned its special permit and substituted new plans. This means of terminating its difficulties was available to it from the very outset. The type of 'impediment' to which reference was had in the *Belfer* case was not one which the party seeking an exception to the statute had the power to remove at will.") - In the Village Arms case, the Planning Board can take such considerations into account in determining whether or not to find good cause for an extension.
- *Braccia v. Mountain* 2005 WL 107092, *5 (Mass.Land Ct.) (Mass.Land Ct., 2005), ("The fact that Scotland Woods commenced no substantial use under the special permit within the two-year period was due entirely to the fact that it was unable to proceed with its development because it needed approval of the concomitant definitive subdivision plan, the Planning Board approval of which is the subject of the appeal in the matter at hand. This court's statements in *Neilson* are directly applicable when applied to the Scotland Woods plan: "[T]he rationale of *Belfer*, if not the holding itself, supports the conclusion that [Scotland Woods's] failure to commence a substantial use under the special permit was for good cause." *Neilson*, 9 LCR at 59. The *Neilson* court went on to find that, even though two calendar years had passed since the granting of a special permit to develop a so-called "open space residential development," and even though no appeals had been filed under G.L. c. 40A, § 17, the time before which the special permit expired was tolled because the developer was unable to proceed with construction because the denial of the subdivision plan for the same development by the planning board was under appeal. *Id.* If anything, the rationale supporting a finding of a good-cause reason for delay is stronger in the instant matter as, contrary to the tolling appeal in *Neilson*, the Scotland Woods plan was approved and is being appealed by a third party, whereas the tolling appeal in *Neilson* was brought after the planning board's denial of a subdivision plan. In sum, this court finds that there exists good cause for Scotland Woods not having commenced substantial work with regards to their OSRD Special Permit. Therefore, the special permit, to date, has not expired.") - In the Village Arms case, the Planning Board can take such considerations into account in determining whether or not to find good cause for an extension.
- Finally, there is the question whether an application for extension is in fact required at all to prevent lapse of a special permit. The Land Court has twice suggested that an affirmative application for an extension is not required, just a finding of "good cause." See *Neilson v. Planning Bd. of Walpole*, 9 LCR 57 (2001) (to determine whether a special permit has lapsed, first, it must be determined whether the period specified in the by-law or special permit has passed; second, the question as to whether the period has been tolled by an appeal of the special permit under G.L. c. 40A, § 17 must be answered; and finally, the examiner must determine, if a substantial use of the special permit has not commenced and the time period specified has passed, whether good cause explains the fact that no substantial use has commenced under the permit); *Braccia v. Mountain*, 2005 WL 107092, *4 (Mass.Land Ct.) (Mass.Land Ct., 2005) (citing *Neilson* for the proposition that "[n]othing in the language of section 9 provides or even suggests that an affirmative extension is required to prevent an automatic lapse of the special permit," *Neilson*, 9 LCR at 59, and agreeing that the permittee was not required to formally apply for an extension of their OSRD Special Permit in order to toll their two-year timeframe to commence construction).
- Where, as here, the Planning Board's special permit expressly required that the permit holder must apply to the Board for an extension at least 30 days before the lapse date, *Neilson* and *Braccia* are distinguishable and the permittee should apply to the Planning Board for the requested extension, setting forth its claim of "good cause."

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November 29, 2005

VIA EMAIL AND REGULAR MAIL

Garry A. Rhodes, Building
Commissioner
Town of Acton
472 Main Street
Acton, MA 01720

Re: Planning Board Decision 01-06
Village Arms Apartments - Special Permit for
Reconstruction of Non-Conforming Multi-Family
Dwelling dated May 9, 2001 (the "Special Permit")

Dear Garry:

As you are aware, my client, Equity Residential, the present owner of the property located at 419 Great Road, the subject of the above-noted Decision, wishes to exercise its rights pursuant to the terms of the Special Permit. In this regard, you have asked that I address the question of whether the Special Permit has lapsed in accordance with the provisions of Section 3.3.4 of the Decision. In preliminary discussions, you have also expressed a belief that the issue of tolling of the two-year period provided for in the Decision and pursuant to M.G.L. Chapter 40A, Section 9 is only applicable if the beneficiary of a special permit is successful in connection with any appeals relating to the Decision.

The legal principles relevant to the tolling argument are addressed by the provisions of M.G.L. Chapter 40A, Section 9 and the provisions of Section 10.3.7 of the Acton Zoning By-Law. Section 9 of Chapter 40A and Section 10.3.7 of the By-Law provide

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Commissioner
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in relevant part: "A Special Permit under this Section shall lapse within a specified period of time, not more than two year...if a substantial use thereof has not commenced except for good cause..."

The Decision in its "FINDINGS AND CONCLUSIONS", Section 2.8, found, among other things, that the Site was not in conformity with waste water treatment and as a "Condition" of the Decision, Section 3.2.11, required that all work on this Site comply with Acton Board of Health regulations.

The "FINDINGS AND CONCLUSIONS" and the conditions effectively bar the use of the Special Permit until a resolution with the Acton Board of Health, and ultimately the Department of Environmental Protection ("DEP"), regarding the waste water treatment system for the Site.

As you and the Board of Health are aware, my client has been in litigation with DEP regarding the issue of sewerage treatment and only recently has a judgment been entered in that matter which requires that my client design and have constructed a package sewerage treatment plant. My client and DEP are presently in the process of coming to terms regarding a Consent Order which will establish the nature of, and a time frame for, the construction of a sewerage treatment facility, along with any interim steps to be required of my client to ensure appropriate disposition of waste sewerage from the Site and the other buildings owned by my client.

It is our position, therefore, that the two year period was tolled due to an actual legal impediment preventing my client's use of the Special Permit and "work" thereunder. It is settled that a legal impediment to the utilization of a special permit tolls the two year period. *Belfer v. Building Commission of Boston*, 363 Mass. 439, 444-45 (1973) (a variance case standing for the proposition that relief from the limitations period should be granted where there exists a legal impediment to its use). In addition, it is also well settled that an equally real practical impediment to the use of the special permit will toll the lapse period. See *Belfer*, 363 Mass. 439; *Pasqualino v. Bd. of Appeals of*

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Wareham, 14 Mass.App.Ct. 989, 990-91 (1982); *Smith v. Bd. of Appeals of Brookline*, 366 Mass. 197, 201-02 (1974). In *Braccia v. Mountain*, 2005 WL 107902 the Land Court recently applied the analysis of *Belfer* to a special permit. Here, my client could not even get a building permit until the DEP issue was resolved. The DEP issue remains unresolved to date.

Perhaps the most instructive and helpful cases in this instance are a few Land Court cases on point. These include *Braccia*, 2005 WL 107902, Judge Green's decision in *Neilson v. Planning Bd. of Walpole*, 9 LCR 57 (term tolled because developer was unable to go forward with construction because other necessary authorization was under appeal) and *Ciccolo v. City of Somerville*, 1991 WL 11259377 (two year period tolled where circumstances of delay were a function of other separate and necessary relief not some action or inaction of applicant).

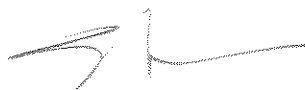
I believe the above noted-cases favorably address both of the issues you raised and cited in the first paragraph of this letter.

Practically speaking, given the conditions in the Special Permit, it was impossible to utilize the Special Permit until issues with the DEP were resolved.

Based upon the foregoing, I would appreciate your assurance that a building permit will issue provided that necessary plans are filed with your office for the reconstruction of the building at 419 Great Road and satisfactory arrangements made with both DEP and the Acton Board of Health for sewerage treatment.

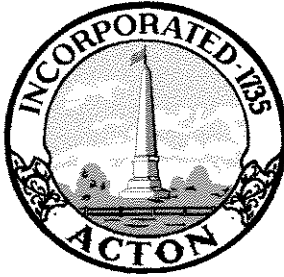
Very truly yours,

GRAHAM & HARSIP, P.C.



Steven R. Graham

cc: Client



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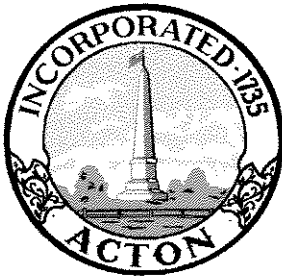
Planning Department

INTERDEPARTMENTAL COMMUNICATION

To: Planning Board **Date:** April 20, 2001
From: Roland Bartl, AICP, Town Planner *R.B.*
Subject: Village Arms: Multifamily Building Reconstruction, 419 Great Road
- Hearing Continuation

This is a continuation of a public hearing first begun in July last year. The building had been destroyed by fire in 1998. The applicant had filed a special permit for reconstruction in time to meet the deadline of section 8.7 of the zoning bylaw. At the time, several issues could not be addressed sufficiently to reach a simple decision, foremost DEP's concern with septic treatment. The Board and applicant agreed to continue. Continuations without further deliberations were agreed upon on four interim occasions. The DEP matter apparently has not been resolved to date, perhaps in part because the property has changed hands.

Due to the changing membership of the Planning Board, I recently advised the applicant's attorney, Mr. Steve Graham, that the special permit matter must draw to a close because there is a risk of losing the quorum. I suggest that the Board hear any updates, then close the hearing, and move towards issuing a decision on May 7. A decision to deny would stop the reconstruction and eliminate 18 apartment units. All that would be left to do is to raze the ruin. A decision to approve would include several conditions that may be affected by DEP's future actions. The decision could be flexible to allow for a range of possible DEP scenarios, but later decision amendments may also be needed.



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Planning Department

INTERDEPARTMENTAL COMMUNICATION

To: Planning Board **Date:** July 19, 2000
From: Roland Bartl, AICP, Town Planner *R.B.*
Subject: **Village Arms Apartments, 419 Great Road - Application for ZBL Section 8.7
Special Permit to Reconstruct Nonconforming Multifamily Dwelling**

Attached is the above referenced application with plans, and review comments that we received from various departments. General information about the proposed project is as follows:

Location:	419 Great Road
Map & Parcel:	C-5/67-1, 67-2, 54
Zoning:	R-A, Groundwater Protection District - Zone 3
Applicant:	Victor N. Morgenthauer, Counselor at Law, of Hartford, CT
Owner:	GPT-Acton, LLC, of Hartford, CT
Hearing Date:	July 24, 2000
Decision Deadline:	October 22, 2000

The application is for a special permit under section 8.7 of the zoning bylaw for the reconstruction of the nonconforming apartment building at 419 Great Road. With 18 units, the proposed new building would contain the same number of apartments as the building that was lost in the fire about a year ago. This building is one of five apartment buildings on the site or property: 411, 419 & 421 Great Road, and 25 & 33 Harris Street. The nonconforming status appears to be related to three areas of the zoning bylaw:

- Consistent with then applicable law, the building was constructed originally without a special permit, whereas today's zoning bylaw requires a special permit (ZBL - section 3, table of principal use, line 3.3.4, column R-A).
- There are 104 dwelling units on the +/-11 acre site (all 5 buildings), or +/-9.5 units per acre. The zoning bylaw limit is 5 units per acre (ZBL - section 5.3.2.1).
- The approximate wastewater discharge on the site is over 20,000gpd with standard septic systems (see DEP 7/5/00 letter). The discharge limit without tertiary treatment in Zone 3 is 6,000 gpd per buildable lot (ZBL - section 4.3.7.2, Table 4.3.7.2, lines 21 & 22).

The ZBL - section 8.7 criteria give the Planning Board broad powers and latitude for evaluating the merits of the proposed reconstruction, and requiring improvements to the site that are related to the issues of nonconformity and to general concerns related to the zoning bylaw's objectives.

That said, I consider it desirable to see the apartment building reconstructed successfully. Not only is the present condition of the fire-damaged building unsightly and potentially hazardous, but the reconstruction will restore housing for people in the lower income brackets and will include two units that are accessible to persons with disabilities. Therefore, I am generally supportive of the

requested special permit. Several issues deserve the Board attention. Please refer to the departmental reviews for additional concerns and recommendations.

1. Wastewater:

The Health Director recommends denial of the special permit on the basis of DEP's 7/5/00 letter stating that a groundwater discharge permit is required for the site - in plain English, that a tertiary treatment plant is required. I recommend against denial. The property owner is in negotiations with DEP over this issue, which may come to a resolution or lead to further court proceedings. Either way, this matter will take its course without Planning Board interference. The special permit had to be, and was, filed within one year of the fire, but there is no second chance after a denial. Denying the special permit would leave the owner with two choices in response - walk away and not rebuild, or appeal the Planning Boards decision in court in an attempt to preserve the reconstruction opportunity. Denial does not seem constructive. However, there is the issue of large quantities of wastewater discharge that does not meet current zoning bylaw standards. The Board could consider the following options:

- a) Do nothing. Grant the special permit while letting DEP action take its course.
- b) Grant the special permit subject to compliance with DEP requirements as a condition for the issuance of a building permit. This is not substantially different from option a).
- c) Continue the hearing and await conclusion of the proceedings with DEP. Then, see if the outcome improves the performance of the wastewater disposal system in a way that is satisfactory to the Board. This could leave the hearing open for quite some time, which is not a favorable choice procedurally.
- d) Grant the special permit requiring a minimum level of advanced treatment for the entire site, or at least for the three buildings along Great Road, such as can be achieved with Bioclere or similar systems. This is more cost effective than a full fledged tertiary treatment plant. It would not achieve the level of performance of a tertiary treatment plant, but would be a vast improvement over existing conditions. DEP requirements could then be more stringent without interfering with the Board's special permit. In case of a complete DEP reversal, this condition would ensure a decent level of improvement. The owner, while concerned about the cost, seemed willing to consider this option. He has acknowledged that systems like Bioclere are being discussed with DEP. He is already thinking about a Bioclere system for the two buildings on Harris Street where the septic system is failing.

2. Plan Certification and Stamp:

Since the application filing date, there has been some wrangling over the authorization of use of certain plans contained in the application (see correspondence by Acton Survey, V. Morgenthaler, and Planning Dept.). Unfortunately, the site plan by Architectural Partners now before us apparently does not meet Board of Registration Standards. It is stamped by an Architect. It shows setback dimensions, which must be certified by a Surveyor's stamp. The applicant should replace the site plan with one that bears the proper stamp.

3. Section 8 subsidized units:

The special permit, if granted, should require that the building must continue to be available to the Acton Housing Authority for the placement of tenants who receive Federal Section 8 subsidies. The section 8 program is administered locally by the Housing Authority.

4. Accessible Units:

Consistent with the State Building Code's Architectural Access Board regulations the special permit should require two handicapped accessible units.

5. Landscaping:

The landscaping is decent enough. I agree with the Tree Warden's recommendation. To

establish a record and guide for landscaping after the reconstruction is finished, the special permit should require a landscape plan that is consistent with current conditions and specifies proper loaming and seeding/planting of areas disturbed during construction.

6. Architectural Plans:

The Board should evaluate the architectural renderings, especially the side elevations. The public is likely to judge the merits of the Board's action, more than on anything else, on the appearance of the reconstructed building.

Cc: Town Manager
Applicant
Health Director

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